STATE OF MICHIGAN

COURT OF APPEALS

KIMBERLY L. PARKHURST and DANNY L. PARKHURST,

Plaintiffs-Appellants,

v

CURTIS BARTZ,

Defendant-Appellee.

UNPUBLISHED
August 21, 2001

No. 223576
Cheboygan Circuit Court
LC No. 99-006528-NO

Before: Fitzgerald, P.J., and Gage and C. H. Miel*, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs rented a cabin from defendant. Plaintiffs were walking to the rear of the cabin when Kimberly Parkhurst fell to the ground and injured her leg. It was dark at the time, and the area was not lighted by artificial lighting. Danny Parkhurst concluded that his wife tripped in a hole located two to four feet from the footpath that ran alongside the cabin. Plaintiffs' complaint alleged that defendant negligently failed to maintain the premises in a safe condition and to warn of the dangerous and unsafe condition. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the condition was open and obvious, and that plaintiffs could not establish a causal link between Kimberly Parkhurst's injuries and any breach of duty. The trial court granted the motion, finding that the condition was open and obvious, and noting that plaintiffs made a conscious decision to walk in the dark.

We review a trial court's decision on a motion for summary disposition de novo. *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Berryman v K-Mart Corp*, 193 Mich App 88, 91-92; 483 NW2d 642 (1992).

* Circuit judge, sitting on the Court of Appeals by assignment.

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). If the risk of harm from a dangerous condition remains unreasonable, in spite of the fact that it is open and obvious or that the invitee has knowledge of it, the possessor of land must take reasonable care. *Bertrand, supra*, 611.

Plaintiffs argue that the trial court erred by granting defendant's motion for summary disposition. We disagree and affirm. The hole in which plaintiffs allege that Kimberly Parkhurst tripped was approximately three feet in width and eight inches deep at its center. Danny Parkhurst acknowledged that an average person with ordinary intelligence would discover the hole upon casual inspection, at least during daylight hours. The hole in which Kimberly Parkhurst tripped was open and obvious. The fact that plaintiffs claim that they did not see the hole is irrelevant. *Novotney, supra*, 477. Plaintiffs' reliance on *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119; 492 NW2d 761 (1992), for the proposition that defendant had a duty to take reasonable care because the condition, while open and obvious, remained unreasonably dangerous, is without merit. In that case, the plaintiff was injured when he fell from an interior, recessed loading dock in a dark warehouse. The plaintiff had been in the warehouse on previous occasions, but had no reason to know that a loading dock was located inside the warehouse. The *Knight* Court affirmed judgment for the plaintiff, finding that the facts did not establish that the plaintiff encountered an open and obvious condition that permitted him to intelligently choose to incur the risk of remaining in the dark warehouse. *Id*., 127. The condition which allegedly caused Kimberly Parkhurst's injury was open and obvious, and plaintiff failed to provide evidence of special aspects of the condition to justify imposing liability on defendant despite the open and obvious nature of the danger. *Lugo v Ameritech Corp, Inc*, ___ Mich ___; ___ NW2d ___ (No. 112575, decided 7/3/01). Plaintiffs chose to walk in the area at night and to incur the risk of veering off the path. A reasonably prudent person will take appropriate care for his or her own safety. *Bertrand, supra*, 616. It is reasonable to conclude that Kimberly Parkhurst would not have been injured had she been watching the area in which she was walking. *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage
/s/ Charles H. Miel